

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 80 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS and
MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.
2. To be referred to the Reporter or not? No.
3. Whether Their Lordships wish to see the fair copy of the judgement? No.
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.
5. Whether it is to be circulated to the Civil Judge?

No.

RASHMABHAI KASHANABHAI KHER

Versus

STATE OF GUJARAT

Appearance:

MR MM TIRMIZI FOR MR PM THAKKAR for the appellant.
MR.MA BUKHARI, APP, for the Respondent.

CORAM : MR.JUSTICE K.R.VYAS and
MR.JUSTICE M.S.PARIKH

Date of decision: 20/01/98

ORAL JUDGEMENT

PER : K.R.VYAS, J.

The appellant (original accused No.2), alongwith four other accused, was tried for the offences punishable under Sections 302, 147, 148, 336 read with Section 149 of the Indian Penal Code for causing death of Havji Bhura and causing injuries to Rupa Bhura ,PW 1, Ex.12; Soma Havji, PW 5, Ex.17 and Kanuben Havji,PW 2, Ex.14 with sticks and stones, by the learned Additional Sessions Judge, Sabarkantha at Himatnagar in Sessions Case No. 75/90 who, by his judgment and order dated 20-12-90 , has convicted him for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life. Original accused Nos. 1,3,4 and 5 were convicted for offence punishable under Section 323, and in the alternative, under Section 337 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for one month and to pay a fine of Rs.100/-, in default to undergo further R.I.for seven days. In substance, all the accused, except accused No.2-the appellant herein, were acquitted for the offences punishable under Sections 302, 147, 148 and 336 read with Section 149 of the Indian Penal Code. The appellant has, therefore, challenged the said judgment and order of conviction and sentence passed against him by the learned Additional Sessions Judge, Sabarkantha at Himatnagar by way of this appeal.

It may be stated that against the said judgment and order of acquittal of the rest of the accused for offences punishable under Sections 302, 147, 148 and 336 read with Section 149 of the Indian Penal Code, the State filed an appeal being Criminal Appeal No. 92/91 which, however, came to be dismissed on 2-7-91 at the admission stage by a Division Bench of this Court. In view of this factual position, since the appellant has been convicted only on the basis the individual part played by him in the incident which resulted into the death of Havji Bhura, we are required to consider in this appeal the legality and propriety of the judgment and order of conviction and sentence passed against the appellant without invoking the provisions of Sections 147, 148 and 336 read with Section 149 of the Indian Penal Code.

It is the prosecution case that the prosecution witnesses, the deceased and the accused are closely related to each other. There was a dispute with respect to the ownership of agricultural land between the accused, the complainant and his brother deceased Havji

Bhura as it was alleged that the accused tried to take forcible possession of the land. In fact, out of desperation, the deceased had left the village Khergadh and settled in village Nandargam. Likewise complainant Rupa Bhura, PW 1, Ex.12, also left village Khergadh. It is the further case of the prosecution, that as the marriage of Kanuben-the daughter of deceased Havji and Maluben, PW 3, Ex.15, was fixed, the complainant, the deceased, Maluben-the wife of the deceased and Soma Havji, PW 5, Ex.17, went to Khedbhramma for purchase of clothes with the letter of recommendation given by Karansinh Darbar, PW 9, Ex.33, for getting the clothes on credit. It appears that the concerned shopkeeper did not oblige them by giving clothes on credit. Therefore, all of them came back in the evening and when they were taking loaves prepared by Kanuben, PW 2, all the accused, who were sitting in the house of one Bhupta Dita started quarrel with the deceased by making a grievance as to why they were not taken to Khedbhramma. Complainant Rupa advised the deceased not to give any reply to the accusation initiated by the accused. The accused thereafter started pelting stones at the house of the deceased with the result certain roof-tiles were broken. The deceased, the complainant and Soma Havji, PW 5, tried to run away towards their house. However, the accused started giving blows with sticks carried by them to and pelted stones on the deceased and others, with the result deceased Havji Bhura died instantaneously. Complaint, Ex.13, was filed with Khedghar Police Station on the next day. P.S.I. Rajendra Marathe, PW 13, Ex.38, investigated the case on the basis of the complaint, Ex.13, and on completion of the investigation, filed a chargesheet against all the accused. After committal of the case to the Court of Session, the learned Additional Sessions Judge, Sabarkantha at Himatnagar, as stated earlier, passed the impugned judgment and order of conviction and sentence against the appellant which the appellant has challenged by way of this appeal.

Mr. M. M. Tirmizi, learned Advocate, appearing for the appellant, after having taken us through the evidence of the prosecution witnesses, submitted that no conviction can be based on the evidence of the interested witnesses and as the prosecution has not examined any independent witness, the appeal is required to be allowed. Alternatively, Mr. Tirmizi submitted that considering the facts and circumstances of the case viz that the incident in question took place suddenly in a heat of moment, and the accused had not acted in cruel manner, the appellant is entitled to the benefit of Exception IV to Section 300 of the Indian Penal Code and

at best he can be convicted for the offence punishable under section 304, Part I and not Section 302 of the Indian Penal Code.

Mr. M.A.Bukhari, learned Additional Public Prosecutor, on the other hand, supported the judgment of the learned trial Judge in toto.

Since we have narrated the facts in detail, it is not necessary for us to reproduce the evidence of the prosecution witnesses and we will restrict ourselves to the allegations of the prosecution witnesses regarding the part played by the appellant. Rupa Bhura, PW 1, has given details about the blows given by the accused. He has stated that the appellant had given stick blows on the head, stomach and the left eye of the deceased. According to him, accused No.1-Kashna Homi had also caused stick injuries on the stomach as well as chest of the deceased. One more allegation has been made against the appellant by this witness when he states that the appellant had pelted stones on Kanuben, PW 2 and Rama Madha, PW 4. Kanuben, PW 2, in her evidence has only stated that accused Nos.1 and 2 had caused injuries with sticks and stones to her father. According to her, her father fell down because of the stones pelted by accused No.3-Babu Kala. Maluben, PW 3-the wife of the deceased, in her evidence has only stated that accused Nos.1,2 and 3 had caused injuries with sticks and stones to her husband and because of that her husband had fallen down. One ore witness Soma Havji, PW 5, in his evidence has stated that accused No.2-Reshma Kashna and accused No.3-Babu Kala had inflicted stick blows on his father (the deceased) on chest as well as on the back. With this evidence on record, it is clear that all the witnesses are consistent as far as the part played by the appellant in causing injuries by stick is concerned. However, it is not clear as to on which part of the body of the deceased, the stick blows were inflicted. In view of the discrepancies in the evidence of Rupa Bhura, PW 1 and Soma Havji, PW 5, as according to Rupa Bhura the stick blows were inflicted by the appellant on the head, stomach and left eye while according to Soma Havji they were on the chest as well as on the back of the deceased not only by the appellant but by accused No.3-Babu Kala also, it is necessary to scrutinise the evidence of Dr. Jiteshbhai A.Desai, PW 7, Ex.19, who, at the relevant time, was serving as Medical Officer at Khedbhramma and who performed the post mortem examination on the dead body of the deceased. Dr.. Desai has found the following injuries on the person of the deceased Havji:

1 A CLW over upper part of forehead 4 cm x 0.5 cm

x 1.0 cm (deep).

2 A CLW over Right parietal region 2 cm x 0.5. cm
x 0.5 cm.

3 A contusion mark over Left side chest wall (anteriorly) of the size of 6 cm x 2 cm. Underlying tissues were dark. Ribs were normal.

4 A contusion mark over anterior abdominal wall on left side of the size of 4 cm x 1 cm. Underlying tissues were dark.

5 A contusion mark over top of the neck 7 cm x 6 cm. Underlying tissue were dark.

6 Superficial abrasion over right knee and chin and left heel.

Dr. Desai has opined regarding the cause of death that, "From the internal and external examination of the dead body it could be concluded that death was due to spinal cord damage following spine injury and the person should have been dead within previous 24 hours from the hour of examination". Thus, the cause of death was due to spinal cord damage, which was possible in view of injury No.5 - contusion mark over top of the neck 7 cm x 6 cm. It is not even the say of the complainant that the appellant is responsible for having caused the said injury. We are, therefore, of the view that the appellant cannot be made responsible for causing the said injury. As stated above, even as per the evidence of Soma Havji ,PW 5, he is also not giving the complete detail whether the appellant caused back injury with stick to the deceased. He is pointing fingers not only at the appellant but also at accused No.3-Babu Kala that both of them had caused injuries on the chest as well as on the back of the deceased with sticks. Since this witness has not corroborated the complainant, it is not possible to accept the say of this witness Soma Havji and conclude that the appellant is responsible for causing back injury on the person of the deceased. In view of this finding, it is difficult to hold that the appellant is responsible for causing death of deceased Havji. However, in view of the consistent say of all the prosecution witnesses regarding the part played by the appellant in inflicting blows on the head, stomach and left eye of the deceased, we have to hold that he was very much present and had participated in the incident and caused injuries on the person of the deceased. Considering the fact that all the accused were present when the incident in question took place and had

initiated quarrel on the very trifling issue as to why they were not taken to Khedbhramma for the purpose of purchasing clothes, we are of the opinion that the incident occurred without any premeditation and the accused have acted in a fit of anger. It is also clear that all the accused have not taken any undue advantage or acted in a cruel manner. They have used only sticks and pelted stones and caused injuries one of which proved fatal. We are, therefore, of the view that the appellant is entitled to the benefit of Exception IV to Section 300 of the Indian Penal Code and, therefore, he can be convicted under Section 304, Part I of the Indian Penal Code. Since the incident in question had taken place on 6-6-90 and the appellant is in jail since then, we are of the view that if the sentence already undergone by the appellant is imposed on him, it would meet with the ends of justice.

In the result, the appeal is partly allowed. The judgment and order of conviction and sentence passed against the appellant for offence punishable under section 302 IPC by the learned Additional Sessions Judge, Sabarkantha at Himatnagar, is set aside and the appellant is convicted for the offence punishable under Section 304, Part I of the IPC and is sentenced to suffer R.I. for the period already undergone by him. Consequently, therefore, the appellant is ordered to be released forthwith, if not required in connection with any other offence.

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